IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

LEROY RYAN,	)	1 CA-SA 99-0011
Petitioner,	)	DEPARTMENT E
v.	)	
	)	O P I N I O N
THE HONORABLE SILVIA R. ARELLANO, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,	)	Filed 6-3-99
Respondent Judge,	)	
STATE OF ARIZONA,	)	
Real Party in Interest.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 95-02774

The Honorable Silvia R. Arellano, Judge

JURISDICTION ACCEPTED, RELIEF GRANTED

Office of the Legal Defender
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N O Y E S, Judge

1 The State tried Petitioner for aggravated assault kidnapping, and felony murder predicated on kidnapping. The jury found Petitioner guilty of aggravated assault and unlawful imprisonment (a lesser-included offense of kidnapping), and it did not reach a verdict on felony murder. After the court ruled that the State could retry Petitioner for felony murder predicated on kidnapping, Petitioner filed a petition for special action. We previously accepted jurisdiction and we now grant relief. Because conviction of a lesser-included offense of kidnapping operates as an acquittal of kidnapping, the State is barred by double jeopardy and collateral estoppel principles from retrying Petitioner for kidnapping or felony murder predicated on kidnapping.

I.

2 Petitioner and fellow gang members were socializing i

the neighborhood when the victim drove up. Because the victim was thought to be in a rival gang, someone dragged him out of the car. Petitioner pointed a gun at the victim while others interrogated him about why he was in the area. Suddenly, someone else raised a gun and shot the victim, who died as a result.

3 The State's case against Petitioner went to the jury o three charges: kidnapping, aggravated assault, and felony murder predicated on kidnapping. In addition to finding Petitioner guilty of aggravated assault and unlawful imprisonment, the jury found that each offense was dangerous and the victim was under fifteen years of age. In answer to a question that was on the unlawful imprisonment verdict form at the State's request and over Petitioner's objection, the jury signified that it was "[u]nable to unanimously decide on a verdict of the greater charge of Kidnapping."

4 The State concedes that Petitioner cannot be retried fo kidnapping. When the State asked for retrial on felony murder predicated on that same kidnapping, Petitioner moved to dismiss on double jeopardy grounds. The court denied the motion. Petitioner timely filed this petition for special action.

5 We accepted jurisdiction because the petition raised meritorious double jeopardy/collateral estoppel claim, see Nalbandian v. Superior Ct., 163 Ariz. 126, 130, 786 P.2d 977, 981 (App. 1989), and it also raised a pure question of law regarding State v. LeBlanc, 186 Ariz. 437, 924 P.2d 441 (1996).

II.

6 When a defendant is tried on a greater offense an convicted on a lesser-included offense, the conviction operates as an acquittal of the greater offense. See Green v. United States, 355 U.S. 184, 191 (1957). The double jeopardy clauses of the state and federal constitutions protect a defendant who has been convicted of a lesser-included offense from being retried on the greater offense. See Brown v. Ohio, 432 U.S. 161, 169 (1977); State v. Seats, 131 Ariz. 89, 91-92, 638 P.2d 1335, 1337-38 (1981).

7 State v. Maloney, 105 Ariz. 348, 357, 464 P.2d 793, 80 (1970), observed that Green "rested on the ground that the jury verdict [on second degree murder] was an implicit acquittal of the charge of first degree murder . . . . The Court made it clear that Green's jeopardy for first degree murder came to an end when the jury was discharged at the first trial." We will follow and apply those principles here.

8 Until 1996, Arizona required that a jury actually acqui on the greater offense before considering lesser-included offenses. See State v. Wussler, 139 Ariz. 428, 430, 679 P.2d 74, 76 (1984) (approving instruction requiring jury to acquit on the greater offense before considering lesser-included offenses). In LeBlanc, the supreme court abandoned this "acquittal first" procedure. 186 Ariz. at 440, 924 P.2d at 444. For various policy reasons, the LeBlanc court decided that it was better practice to require only that jurors use "reasonable efforts" to reach a verdict on the greater offense before considering lesser-included offenses. Id.

9 One benefit of the LeBlanc procedure is that "it reduce the risks of false unanimity and coerced verdicts." Id. at 438, 924 P.2d at 442. Another is that it "diminishes the likelihood of a hung jury, and the significant costs of retrial, by providing options that enable the fact finder to better gauge the fit between the state's proof and the offenses being considered." Id. at 438-39, 924 P.2d at 442-43. And finally, "because such an instruction

would mandate that the jury give diligent consideration to the most serious crime first, the state's interest in a full and fair adjudication of the charged offense is adequately protected." Id. at 439, 924 P.2d at 443 (emphasis supplied).

10 As noted in Justice Martone's concurring opinion, th Wussler "acquittal first" procedure had benefits, too: "From the defendant's standpoint, it may prevent any conviction at all. From the state's standpoint, it tends to avoid a compromise verdict, which deprives the state of a re-trial on the greater charge." Id. at 441, 679 P.2d at 445 (Martone, J., concurring). The benefits of Wussler are thus the drawbacks of LeBlanc, and vice versa, and no matter which procedure is used, the resulting verdict may be difficult to accept, and, in post-verdict hindsight, one or both parties may feel that they would have done better under the other procedure.

11 In this case, the State partially accepts the verdicts It concedes that it cannot retry the kidnapping charge, but it argues that it should not be deprived of retrying the felony murder charge predicated on that kidnapping. The State argues that the LeBlanc court "seems not to have considered a situation like this one where, because the jury is undecided on the felony predicate, they are also undecided on the felony murder charge." That may be true. The State argues that nothing in LeBlanc forbids asking the jury to specify whether it was able to reach a verdict on the greater charge. That is true. Petitioner responds by arguing that

> [t]o hold that trial courts may ask juries if they were hung on the greater offense and then to allow retrial would be an indirect reversal of LeBlanc and a return to the "acquittal first approach" established in State v. Wussler . . . . Therefore, the State is, in effect, asking this Court to revisit the soundness of LeBlanc's holding and to reverse, or at the least nullify, an Arizona Supreme Court case.

We largely agree with that argument, too.

12 To the extent that the State bases its right to retria on the jury's failure to reach a verdict on the kidnapping charge, the State's interpretation would afford defendants less double jeopardy protection under LeBlanc than they had under Wussler, Green, and Maloney. The State's argument would partially nullify LeBlanc and revive the "acquittal first" procedure -- at the unilateral option of the State in some cases. But LeBlanc did not intend to create any such unilateral options.

13 Protection from double jeopardy is a matter of substan tive law. The LeBlanc court was very clear that it was not changing substantive law; it announced, "the change we make today is procedural in nature, adopted for purposes of judicial administration." Id. at 440, 924 P.2d at 444. The court stated, "we are dealing here with court-created procedure, not an interpretation of constitutional text, statutory provision, or substantive common law principle." Id. at 439, 924 P.2d at 443. Because LeBlanc was intended to have no effect on substantive law, it should be interpreted to have no such effect. Therefore, the "implicit acquittal" principles of Green and Maloney apply under LeBlanc just as they did under Wussler.

14 The State argues that we should reject the "implici acquittal" principles and follow United States v. Bordeaux, 121

F.3d 1187, 1192 (8th Cir. 1997), which held that a jury's statement that it did not reach a verdict on the greater charge "obviously precludes the inference that there was an implied acquittal." We respectfully disagree with Bordeaux insofar as it distinguished Green, and we distinguish Bordeaux because that court did not have to deal with the LeBlanc-Wussler procedural-substantive issue that exists in this case and jurisdiction.

15 Unless conviction of a lesser-included offense has th same "implicit acquittal" effect under LeBlanc that it did under Wussler, LeBlanc becomes a significant revision of substantive law -- after announcing that it was only a revision of procedural law. We decline to interpret LeBlanc so that it has unintended consequences on double jeopardy law. We hold that conviction of a lesser-included offense has the same "implicit acquittal" effect under LeBlanc that it had under Wussler. Under either procedure, conviction on a lesser-included offense results in a valid and final judgment that operates as an acquittal of the greater charge.

16 We also hold that a jury returning a guilty verdict on lesser-included offense should not be asked to signify whether it reached a verdict on the greater charge. Such an interrogatory is superfluous, and it is precluded by Rule 23.2(a), Arizona Rules of Criminal Procedure, which provides, "Except as otherwise specified in this rule, the jury shall in all cases render a verdict finding the defendant either guilty or not guilty."

III.

17 The question now becomes whether Petitioner can b retried for felony murder predicated on kidnapping after having been tried and acquitted of that kidnapping. Under either Wussler or LeBlanc, the answer is no. On the undisputed facts here, that retrial is barred by the doctrine of collateral estoppel.

18 Collateral estoppel "bars relitigation between the sam parties of issues actually determined at a previous trial." Ashe v. Swenson, 397 U.S. 436, 442 (1970). Application of the collateral estoppel doctrine is required in criminal cases by two provisions of the United States Constitution: the Due Process Clause of the Fourteenth Amendment and the Double Jeopardy Clause of the Fifth Amendment. See id. at 441-42. Collateral estoppel "means simply that when a issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Id. at 443. See also State v. Luzanilla, 176 Ariz. 397, 401, 861 P.2d 682, 686 (App. 1993) (recognizing application of collateral estoppel in criminal cases), rev'd in part, 179 Ariz. 391, 880 P.2d 611 (1994).

19 To decide whether collateral estoppel applies, the cour must review the record and determine "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." Ashe, 397 U.S. at 444. We do not have a complete record here, but we do have undisputed material facts. It is undisputed that the alleged kidnapping was the sole predicate for felony murder in the first trial, and that the kidnapping charge resulted in conviction of a lesser-included offense that is not a predicate for felony murder. It is also undisputed that the State seeks to retry Petitioner for felony murder predicated on that same kidnapping. Because those facts are undisputed, we can decide the collateral estoppel issue without having the entire record of the first trial.

20 In arguing that collateral estoppel does not apply, th State relies on Luzanilla, a case in which the victims were murdered in their home. 176 Ariz. at 399, 861 P.2d at 684. The jury convicted on theft, acquitted on burglary, and failed to reach a verdict on felony murder. See id. at 400, 861 P.2d at 685. The defendant argued that retrial on felony murder was barred because the acquittal meant that the jury "necessarily decided that he neither committed nor attempted to commit any felony while inside the victims' home that would support a finding of felony murder." Id. at 402, 861 P.2d at 687.

21 Luzanilla refused to apply collateral estoppel because i decided that, considering the undisputed evidence, "a rational jury could not have acquitted appellant of first-degree burglary for a failure of proof." Id. The court found "internally inconsistent verdicts from which we can only conclude that the jury acted irrationally." Id. at 403, 861 P.2d at 688. The court therefore concluded that "we are not persuaded that the first jury resolved the very factual question at issue in appellant's favor." Id. Retrial was allowed. The supreme court took review, then dismissed it and approved of the "disposition" on the collateral estoppel issue. See State v. Luzanilla, 179 Ariz. at 393, 880 P.2d at 613.

22 We distinguish Luzanilla on its facts and we question it analysis. The court faulted the verdicts for being inconsistent, but it is well settled that "consistency between the verdicts on the several counts of an indictment is unnecessary." State v. Zakhar, 105 Ariz. 31, 32, 459 P.2d 83, 84 (1969) (citing Dunn v. United States, 284 U.S. 390 (1932)). The court faulted the jury for rejecting undisputed evidence, but

> "[i]f a later court is permitted to state that the jury may have disbelieved substantial and uncontradicted evidence of the prosecution on a point the defendant did not contest, the possible multiplicity of prosecutions is staggering. . . . In fact, such a restrictive definition of 'determined' amounts simply to a rejection of collat-eral estoppel . . . ."

Ashe, 397 U.S. at 444 n.9 (quoting Daniel K. Mayers & Fletcher L. Yarbrough, Bis Vexari: New Trials and Successive Prosecutions, 74 Harv. L. Rev. 1, 38 (1960)).

23 The Luzanilla court decided that "it appears that th jury either misconstrued its instructions or compromised on its verdict." 176 Ariz. at 402, 861 P.2d at 687. But compromise verdicts are as valid and final as other verdicts. The fear of compromise verdicts was raised in LeBlanc as one reason for retaining the "acquittal first" procedure. 186 Ariz. at 439, 924 P.2d at 443. The court rejected that argument by stating: "We believe these fears to be unfounded. Jurors are presumed to follow instructions. Moreover, experience teaches us that they possess both common sense and a strong desire to properly perform their duties." Id. (citations omitted).

24 The State argues that when the jury found Petitione guilty of both aggravated assault and unlawful imprisonment, it necessarily found that the State proved all elements of kidnapping. The only problem with that argument is that it was rejected by the jury, which had the opportunity to convict Petitioner of kidnapping and convicted him of unlawful imprisonment instead. The jury was not asked to predicate a felony murder conviction on aggravated

assault. Kidnapping was the only felony murder predicate given to the jury. As to that predicate, we can only conclude that the jury gauged the fit between the State's proof and its charges to be this: Petitioner was guilty of the lesser-included offense of unlawful imprisonment. There is no way to look at that verdict without concluding that it is grounded upon a determination by the jury that the State failed to prove the kidnapping charge. Therefore, collateral estoppel applies as to kidnapping and felony murder predicated on kidnapping.

25 We distinguish State v. Lacy, 187 Ariz. 340, 929 P.2 1288 (1996), where the defendant was convicted of felony murder after receiving "a directed verdict on the underlying burglary charge because the statute of limitations had expired." Id. at 350, 929 P.2d at 1298. The defendant argued that the directed verdict operated as an acquittal. See id. The supreme court held that there was no judicial finding on the merits of the burglary charge and, therefore, "the dismissal did not operate as an acquittal, and we will not treat it as such." Id. There was such a judicial finding here. In the present case, the kidnapping charge went to the jury, and the jury concluded that the State had proved only a lesser-included offense.

26 The State correctly concedes that it cannot retr Petitioner for kidnapping. The same principles that bar the State from retrying the kidnapping charge bar the State from retrying Petitioner for felony murder predicated on kidnapping. "A defendant's acquittal or conviction of a felony, such as robbery or arson, is a bar to a subsequent prosecution for a homicide which occurred in the course of such felony." 1 Charles E. Torcia, Wharton's Criminal Law 69, at 512 (15th ed. 1993). See also State v. Liberatore, 445 N.E.2d 1116, 1118 (Ohio 1983) ("[T]he guarantees of double jeopardy prohibit retrial of an accused [for felony murder] after the accused has already been acquitted of the underlying felony at a previous trial.").

27 Petitioner could arguably be retried for felony murde based on predicates other than kidnapping. See State v. Bravo, 171 Ariz. 132, 137-38, 829 P.2d 322, 327-28 (App. 1992) (holding that defendant acquitted of armed robbery could be retried for felony murder based on that same predicate conduct, but alleged as a burglary). Whether events in the first trial bar the State from now alleging a felony murder predicate other than kidnapping is a fact-intensive issue that cannot be decided on this partial record.

IV.

28 We previously accepted jurisdiction and we now gran relief by remanding for proceedings consistent with this decision.

E. G. NOYES, JR., Judge

CONCURRING:

NOEL FIDEL, Presiding Judge

W E I S B E R G, Judge, Dissenting

29 I respectfully dissent because I conclude that specia action jurisdiction has been improvidently granted by the majority and because I disagree with the majority's analysis of the substantive issues.

Special Action Jurisdiction

30 Petitioner's special action raises three questions:(1 whether the court erred in permitting the verdict form used, (2) whether the State can retry petitioner on the felony murder charge using kidnapping as the predicate felony, and (3) whether the State can retry petitioner for felony murder using any of its alternative predicate felonies. Petitioner, however, has not provided this court with a sufficient record for us to resolve all three issues. For example, although petitioner argues that he objected to the inclusion of the inquiry on the kidnapping verdict form, he has not provided us with copies of the actual verdict form, of his objection to the State's request for the interrogatory, or of transcripts of any oral arguments on the issue. Consequently, we do not know what arguments the trial court considered in deciding that the verdict form was appropriate.

31 Similarly, because we do not have copies of the tria transcript, the full transcript of the Rule 20 hearing, and the transcript of the hearing to dismiss the refiled count, we cannot even consider whether the State is precluded from retrying petitioner for felony murder using any alternative predicate felony. This issue must first be resolved by the trial court because the State and petitioner disagree about what was argued to and resolved by the trial court in the Rule 20 hearing, which again makes this action improper for special action consideration. See State Comp. Fund v. Symington, 174 Ariz. 188, 192, 848 P.2d 273, 277 (1993) (special action jurisdiction appropriate when "the issue before us turns solely on legal issues rather than on controverted factual issues"); see also Florez v. Sargeant, 185 Ariz. 521, 530, 917 P.2d 250, 259 (1996) (special action consistently declined in cases involving factual disputes).

32 Because of the incomplete record, the majority chooses t resolve only two of petitioner's three claims, while leaving the equally important third issue unanswered: whether petitioner can still be retried for felony murder using a different predicate felony. If the State attempts to do so, petitioner will either have to file another special action or appeal if convicted. This type of piecemeal resolution of the issues is contrary to principles of judicial economy. See, e.g., State ex rel. LaSota v. Corcoran, 119 Ariz. 573, 575, 583 P.2d 229, 231 (1978) (in majority of actions, preferable to review case in its entirety following trial to eliminate conjecture and avoid piecemeal appellate supervision of trial and prolonging of litigation).

33 In a special action, the burden is on the petitioner t provide a sufficient record. See Rule 7(e), Rules of Procedure for Special Actions. Because petitioner has not provided a sufficient record to answer all of the claims he has raised and because he will have an adequate remedy on appeal at such time as the full record is available, I would decline special action jurisdiction.

Double Jeopardy/Collateral Estoppel

34 I also respectfully disagree with the majority'

conclusion that a retrial for felony murder using kidnapping as the predicate felony would violate petitioner's rights against double jeopardy. The double jeopardy clause "protects a criminal defendant against repeated prosecutions for the same offense." State v. Givens, 161 Ariz. 278, 279, 778 P.2d 643, 644 (App. 1989). The argument that double jeopardy applies at all in this case ignores the fact that there are no lesser included offenses to felony murder. See State v. Jackson, 186 Ariz. 20, 27, 918 P.2d 1038, 1045 (1996). The conviction on the charge of wrongful imprisonment, therefore, cannot violate petitioner's double jeopardy rights because unlawful imprisonment is neither a lesser included offense nor a predicate felony for felony murder. See State v. Detrich, 178 Ariz. 380, 383, 873 P.2d 1302, 1305 (1994) (Detrich I). It merely means that the State cannot retry petitioner for kidnapping.

35 The majority also maintains that the only way to "look at the conviction on the unlawful imprisonment charge is to conclude that the "State failed to prove the kidnapping charge." But the apparent inconsistency of failing to convict on the separate kidnapping charge, while holding open the possible future conviction on felony murder with kidnapping as the predicate felony, does not raise double jeopardy concerns. To the extent such result might seem inconsistent, which as the discussion below indicates is not the better view here, it is clearly within the jury's province to reach inconsistent verdicts. See Zakhar, 105 Ariz. at 32, 459 P.2d at 84 (1969) (consistency among verdicts on several counts of indictment unnecessary); State v. Webb, 186 Ariz. 560, 563, 925 P.2d 701, 704 (App. 1996) (inconsistent verdicts on different counts not impermissible in Arizona).

36 I similarly depart from the majority's conclusion tha collateral estoppel bars the State from retrying petitioner on the felony murder charge using kidnapping as the predicate felony. Luzanilla I tells us that collateral estoppel bars the State from "relitigating a question of fact that was determined in the defendant's favor by a partial verdict." 176 Ariz at 401, 861 P.2d at 686 (emphasis added). In Luzanilla I, the jury hung on the felony murder charge and acquitted on the predicate felony of first-degree burglary, but that did not prevent the State from using that same burglary charge to retry the defendant for felony murder. Instead, after reviewing the entire record of the prior proceeding, this court determined that a rational jury could not have acquitted the defendant of first-degree burglary because, had it done so, it would also have acquitted him of the felony murder charge. 176 Ariz. at 402, 861 P.2d at 687. Thus, this court reasoned, the jury had not resolved the factual question at issue in the defendant's favor; and collateral estoppel did not bar retrial using the same underlying predicate felony. 176 Ariz. at 403, 861 P.2d at 688. This court's reasoning was upheld by the supreme court, which affirmed that portion of our decision in Luzanilla II. 179 Ariz. at 393, 880 P.2d at 613.

37 This case presents an even stronger argument tha collateral estoppel does not bar retrial using the same predicate felony. If an acquittal on a felony cannot bar the retrial of a felony murder charge using that felony as the predicate, then it is hard to explain how an acknowledged hung jury on such a felony can. Here we know with certainty that the jury convicted of the lesser included charge only because it was hung on the kidnapping charge,

while in Luzanilla I we could only surmise what the jury had done based upon the record. Given the information provided in this case, we know that the jury did not determine the ultimate fact in petitioner's favor, which means that collateral estoppel does not apply.

38 The majority, however, also reasons that this case fail to meet the Luzanilla I "irrational jury" test. Again, I disagree. The State contends, and I agree, that the conviction on the aggravated assault and the conviction on the unlawful imprisonment are inconsistent with indecision on the kidnapping charge. By convicting on those two counts, the jury in effect found that the petitioner knowingly restrained the victim by pointing a gun at him, thereby placing him in reasonable apprehension of imminent physical injury. These were the two components of the instant kidnapping charge.

39 While the jury is free to reach inconsistent verdicts this result compels two conclusions. First, that the Luzanilla I irrational jury test has been met here. And, second, having otherwise found the elements of kidnapping to exist, it would be unsound to conclude, even without the hung jury notation on the verdict form, that the jury had thereby found in petitioner's favor on the issue of the predicate kidnapping charge.

40 Moreover, although the majority reproves the State fo accepting "LeBlanc's benefits but not its drawbacks," precisely the same reproof applies to petitioner. Here, petitioner wants to benefit by allowing the jury to convict him of the lesser charge without having to acquit him of the greater, but then be permitted to argue that such result must be treated as an acquittal on the facts. Until today, that has not been the law applicable to felony murder charges.

41 Consequently, although the majority argues that LeBlan instituted a procedural change only and that it therefore should not be used to make any substantive change in the collateral estoppel/double jeopardy law, its opinion uses LeBlanc to do just that. All LeBlanc did was allow a jury to concede that it was convicting on a lesser included offense because it was unable or unwilling to make up its mind about the greater offense. LeBlanc did not address the issue as it affects the use of a predicate felony for a felony murder charge. Nonetheless, relying upon LeBlanc, the majority would change the requirement under present case law that a factual question be substantively determined in a defendant's favor before collateral estoppel steps in to bar a retrial using the same predicate felony. That is both incorrect and a significant substantive change in the law controlling felony murder charges.

Improper Verdict Form

42 Finally, the majority concludes that the placement of th interrogatory on the verdict form is precluded by Rule 23.2(a). Once again, I disagree.

43 To begin, nothing in the language of 23.2(a) prohibit this type of inquiry. Juries are routinely asked to indicate information other than guilty/not guilty on verdict forms, such as findings of "dangerous" or "non-dangerous," or degrees of offenses proved when different degrees are charged. Also, where alternate theories of an offense are submitted and jurors are asked to choose among them, verdict forms soliciting additional information are encouraged. To illustrate, in State v. Smith, 160 Ariz. 507, 513,

774 P.2d 811, 817 (1989), where dual theories of murder were argued to the jury based on felony murder or premeditation, the supreme court noted that dual forms of verdict were desirable because they helped in "reviewing cases on the guilt phase" thus avoiding unnecessary retrials. It also urged trial courts, "as a matter of sound administration of justice and efficiency in processing murder cases in the future . . . to give alternate forms of verdict so the jury may clearly indicate whether neither, one, or both theories apply." Id. See also Detrich I, 178 Ariz. at 383, 873 P.2d at 1305 (court failed to follow procedures suggested by earlier cases to determine whether murder conviction based on premeditation, felony murder or combination of both).

44 Asking the jury to indicate whether it was not able t reach unanimity on the kidnapping charge is no more invasive than asking it to indicate that it convicted on the basis of premeditation rather than felony murder or on the basis of both. Checking the box does not, as petitioner contends, explain the reasoning behind the jury's failure to agree any more than selecting the felony murder theory over the premeditation theory on a verdict form indicates the reasoning behind that decision. Rather, the inquiry is in keeping with the LeBlanc direction that the jury may deliberate on the lesser offense if it "cannot agree whether to acquit or convict" on the greater offense. 186 Ariz. at 438, 924 P.2d at 442.

45 I would hold that the effect of including a printe interrogatory is no different from that which occurs when a trial court orally instructs jurors that their verdict must be unanimous and they report back that they are unable to agree. In Luzanilla I, for example, when the jury failed to reach a verdict on the first-degree murder charges, the trial court "interrogated" the jurors and determined that none of them made a determination based on both premeditation and felony murder, but that "ten of them reached their verdicts on a felony murder theory only." 176 Ariz. at 401, 861 P.2d at 686. A check-off box on a verdict form certainly is no more invasive than such questioning.

46 Moreover, one of the aims of LeBlanc in abandoning th "acquittal first" requirement is to "provid[e] options that enable the fact finder to better gauge the fit between the state's proof and the offenses being considered." 186 Ariz. at 439, 924 P.2d at 443. The comment to sections (c) and (d) of Rule 23.2, which requires the jury to specify the counts and degrees of offense or offenses on which it finds the defendant guilty, notes that "[t]hese provisions insure that the verdict will be clear and unambiguous." LeBlanc, as well as felony murder cases such as Smith and Detrich I, all suggest that more, rather than less, information about the bases for a jury's verdict is preferable in order to ensure that a just result is reached. See, e.g., Smith, 160 Ariz. at 513, 774 P.2d at 817 (alternative forms of verdict desirable because they would permit trial court and reviewing court to know "under which theory the jury convicted defendant" and availability of such information "would be of great benefit" to trial court and reviewing court in determining death penalty questions under Enmund/Tison analysis). Therefore, the use of such verdict forms ought to be encouraged, not prohibited.

47 Ultimately, however, even assuming arguendo that th trial court here improperly included the interrogatory on the verdict form, that inclusion would not affect the outcome of this

case. Even without that information, given LeBlanc, we could not assume that a conviction on the lesser included offense meant that the jury acquitted petitioner on the greater. And, even if it did, given the holding of Luzanilla I, without a review of the entire record, which is not available here, that acquittal alone would not signify that the jury had resolved the facts of kidnapping in petitioner's favor. I would therefore decline special action jurisdiction or, having granted it, deny relief.

Sheldon H. Weisberg, Judge